In my judgment, the circumstances of this particular case do not warrant a finding by this court that there had been a positive wrongful act of dealing with the plaintiff's shares in a manner inconsistent with the plaintiff's rights. The burden of proof, I think, lies with the plaintiff and the court is not satisfied that he has adduced evidence sufficient for this court to hold, on the balance of probabilities, that the defendants are liable for conversion.

For these reasons I dismiss the claim with costs.

Claim dismissed.

Solicitors: *Allen & Gledhill; Eugene Lye & Co.*

NG KIM LEK v. WEE HOCK CHYE

[A.C.J. (Syed Agil Barakbah J.) September 30, 1970]

[Seremban — Civil Appeal No. 3 of 1970]

Bills of Exchange — Claim on cheques — Holder in due course — Whether plaintiff took cheques in good faith — Notice of dishonour — Whether due presentment essential — Bills of Exchange Ordinance, 1949, ss. 29, 31, 48, 49, 55 and 90.

The plaintiff claimed, *inter alia,* (1) the sum of $300 in respect of a cash cheque drawn on the Hongkong and Shanghai Banking Corporation which at the request of the defendant was not presented for payment but had not been redeemed or at all; (2) the sum of $501.30 in respect of a cash cheque drawn on the Malaysian Banking Ltd. which was presented for payment but was dishonoured. The claim was dismissed by the learned magistrate and the appellant appealed.

Held: allowing the appeal: (1) the plaintiff was a holder in due course of the cheque and on the facts had paid value for them and had taken them in good faith and without notice of any defect in the title of the defendant;

(2) although no notice of dishonour had been given in respect of the second cheque, such notice had been waived by implication;

(3) as the first cheque had not been presented at the request of the defendant, the plaintiff was not precluded from suing on it;

(4) on the facts the plaintiff was entitled to judgment for the amount of the cheques.

Cases referred to:-

(1) *Mercantile Bank Ltd., Ipoh* v. *Yoon Siew Kang* [1969] 1 M.L.J. 174.

(2) *Swan* v. *The North British Australasian Co.* (1863) 159 E.R. 73; 2 H. & C. 175.

(3) *Jones* v. *Gordon* (1877) 2 App. Cas. 616.

(4) *Mohamed Amirdin* v. *Varatharajan* [1968] 2 M.L.J. 83.

CIVIL APPEAL.

Atma Singh Gill for the appellant.

P. S. Maniam for the respondent.

Cur. Adv. Vult.

Syed Agil Barakbah J.: This is an appeal by the appellant (plaintiff in the court below) against the decision of the learned magistrate, Seremban, who gave judgment in favour of the respondent (defendant in the court below) with costs.

The plaintiff's claim against the defendant was for the sum of $947.30 made up as follows: —

(a) The sum of $300 in respect of a cash cheque No. C. 875944 drawn on the Hongkong & Shanghai Banking Corporation Ltd., Malacca dated 4th September, 1964, which, at the request of the defendant was not presented for payment but has not been redeemed or at all. (Ex. P1).

(b) The sum of $501.30 in respect of another cash cheque No. 165150 drawn on the Malayan Banking Ltd., dated 18th November, 1964, which was presented for payment but was dishonoured. (Ex. P2).

(c) The sum of $146 being the price of 100 lbs. of frozen chicken wings supplied to the defendant at his written request on 5th September, 1963, (Ex. P3) and accepted by the defendant.

Mr. Atma Singh Gill appeared for the appellant and Mr. P. S. Maniam for the respondent

During the hearing of the appeal Mr. Atma Singh conceded to the decision of the learned magistrate regarding the 100 lbs. of chicken wings, *i.e.* item (c) above. The two items left to be considered were the two cheques (Ex. P1 and P2). The learned magistrate in his grounds of decision relied purely on the facts adduced during the proceeding. He had however failed to consider the legal issues involved relating to the two cheques.

The main ground of appeal was that the learned magistrate was wrong in law and in fact in considering matters which were irrelevant to the main issues in question, when considering the alteration of the date in Ex. P1 in the face of the admission by the respondent who had given evidence that he was responsible for the transactions involving Ex. P1 and P2, the subject matter of the suit. The other remaining grounds were based on the finding of facts by the learned magistrate with which after perusal of the relevant notes of proceedings and grounds of decision, I have no cause to quarrel.

Now, with regard to the main ground of appeal, it is apparent that the two cheques Ex. P1 and P2 are bills of exchange and are therefore governed by the provisions of the Bills of Exchange Ordinance, 1949. (section 73). The relevant provisions of the Ordinance applicable are discussed at great length by Suffian F.J. in the Federal Court in *Mercantile Bank Ltd. Ipoh* v. *Yoon Siew Kang.*[1] I would summarise them as follows: —

A bill payable to bearer as is the case with P1 and P2 is negotiated by delivery. (section 31(2)). The facts showed that the two cheques were issued by the defendant who passed it to P.W. 2 who in turn delivered them to the plaintiff. By such delivery, the plaintiff claims he was holder in due course. A holder in due course is a holder who has taken a bill, complete and regular on the face of it, provided that (a) he became the holder of it before it was overdue and without notice that it had been previously dishonoured, if such was the fact; (b) that he took the bill in good faith and for value, and that at the time the bill was

negotiated to him, he had no notice of any defect in the title of the person who negotiated it. (section 29(1)). The circumstance which makes the title of the person who negotiates a bill to be defective within the meaning of this Ordinance is when he obtained the bill, or the acceptance thereof by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith or under such circumstances as to amount to fraud. (section 29(2)). The rights and powers of a holder in due course are: —

(a) He may sue on the bill in due course in his own name.

(b) He holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill.

(c) When his title is defective, (i) if he negotiates the bill to a holder in due course he obtains a good and complete title of the bill; and (ii) if he obtains payment of the bill the person who pays him in due course gets a valid discharge for the bill (section 38).

There was no doubt that the cheques were complete and regular on their face. There was an alteration of the date on P1 which, in the circumstances, must have apparently been made by the defendant at the request of P.W. 2 with the consent and knowledge of the plaintiff. The provision of section 64(1) therefore does not apply.

The next question was whether the plaintiff took them for value. In this respect the learned Magistrate did not arrive at a definite conclusion when he said, *inter alia*, "It is very strange that the plaintiff was so willing to have second and last transactions (obviously referring to the second cheque (P2) and the order for chicken wings) with the defendant despite the fact that the first cheque was not paid and the order of chicken wings was not settled." He however accepted the defendant's story that he (the defendant) was the owner of the two cheques which he handed to P.W. 2. There was no doubt that the plaintiff took them for value because he maintained that he paid P.W. 2 the said sums of money to be handed to the defendant. On the other hand, the defendant stated that he agreed to help P.W. 2 out of financial difficulties by issuing the post-dated cheques with an undertaking that they were to be claimed only after he had received payment from P.W. 2 to enable him to deposit it in his account to meet the cheques. Otherwise he had no money in the bank to meet the cheques. In this regard, the learned magistrate accepted the evidence of the defendant when he said: "To my mind the defence raised a probable explanation..."

There remained two questions to be decided, namely: —

(a) whether the plaintiff took the cheques in good faith; and

(b) at the times the cheques were negotiated to him he had no notice of any defect in the title of the defendant.

Section 90 provides: —

"A thing is deemed to be done in good faith within the meaning of this Ordinance, where it is in fact done honestly whether it is done negligently or not."

In *Mercantile Bank Ltd., supra*, Suffian F.J. after discussing several authorities summarised the principles applicable. I would apply the principles as follows: —

Negligence on the part of the defendant for letting these cheques loose on the public would make no difference to his liability to an honest holder for value. This is so even if there was no consideration for the cheques and even if they were negotiated by P.W. 2 contrary to the intention reached between him and the defendant provided that the plaintiff took them for value in good faith without notice of P.W. 2's defective title. If the plaintiff's gross negligence had prevented him from acquiring such notice, or by his carelessness or foolishness, he did not suspect that there was something wrong about the cheques, the defendant's liability would not in any way be affected. Similarly, if there were circumstances in the transaction which might have led the plaintiff to suspect that there was something wrong and yet because he was honestly blundering and careless, he took the cheques without further inquiry, the defendant would still be liable. On the other hand, if he was not honestly blundering and careless but thought in his own secret mind there was something wrong and he would have learnt by making further inquiry of the true position, then that would be dishonesty and the plaintiff would not be able to recover. If he had shut his eyes to the facts presented to him and put his suspicions aside without further inquiry, he had not acted in good faith because the existence of suspicion or doubt is inconsistent with good faith.

I have stated earlier the purpose for which the two cheques were issued by the defendant. The learned magistrate found it strange, and rightly so, that the plaintiff at first referred to P.W. 2 as a friend and it was only later in cross-examination that he admitted that P.W. 2 was his step-brother. As such, the plaintiff must have known the financial difficulties which P.W. 2 was experiencing at that time and that the cheques did not belong to him. There was not an *iota* of evidence to show that the plaintiff knew the defendant personally for him to agree to advance him money on post-dated cheques. Even if he were to have done so on the strength of P.W. 2's recommendation, whose financial position he must naturally be aware of, he would not have gone to the extent of agreeing to the extension of payment on the first cheque (Ex. P1) by allowing it to be altered from 18th August, 1961 to 4th September, 1964, a period of three years! To make matters worse the plaintiff later advanced a bigger sum of $501.30 made payable on 18th November, 1964, even when the first cheque had not yet been met. The only irresistible inference that arose in the circumstances was that the plaintiff well knew the money was meant for his step-brother (P.W. 2) on the security of the cheques issued by the defendant. This clearly indicated that the version claimed by the defendant as being probable.

Now, with these facts known to the plaintiff, can he recover from the cheques for which value has been given? In *Swan* v. *The North British Australasian Company*,[2] which was quoted with approval by the Federal Court in the *Mercantile Bank* case, Byles J. said at page 77: —

"....Negligence, in the maker of an instrument payable to bearer, makes no difference in his liability to an honest holder for value; the instrument may be lost by the maker without his negligence or stolen from him, still he must pay. The negligence of the holder, on the other hand, makes no difference in his title. However gross the holder's negligence, if it stops short of fraud he has a title."

In *Jones* v. *Gordon*,[3] also quoted with approval in the *Mercantile Bank* case, Lord Blackburn said, *inter alia*: —

"I should be extremely sorry to say anything which should cast doubt upon the principle that a bill of exchange, ... is negotiable to the fullest extent of its kind. The negotiation of these bills of exchange, in a mercantile country like this, is of great value. ... if it can be shewn that a bill of exchange in its inception was not a good bill of exchange, and that originally it was obtained by fraud, yet a person who has taken it *bona fide* and for value is entitled to sue upon it ... even though it is shewn that there was an infirmity or vice in the title of some of those persons who passed it, unless the knowledge of that vice is brought home to him who took it." (page 627).

In the present case there was no fraud in P.W. 2 obtaining the cheques from the defendant since the purpose for the latter drawing them was known to both. There was no infirmity or vice in the title of the defendant (or to that extent of P.W. 2) who passed them to the plaintiff for value in order to help P.W. 2 in his difficulties. The fact that the defendant depended on P.W. 2 paying him back later to enable him to meet the cheques when presented by the plaintiff for payment (hence the post dates) does not, to my mind, extend to infirmity or vice in the title of P.W. 2 Even though this might be known to the plaintiff at the time the cheques were presented to him and he gave value in return, he took them in good faith and for value.

This was not a case where the bills were negotiated by false pretence or by theft or by a conspiracy to conceal the actual purpose for which they were issued as happened in most of the cases cited and in the *Mercantile Bank* case. As the learned magistrate accepted the defendant's story, it was a case where the actual facts and circumstances were known to the plaintiff, if not at the time when the first cheque (Ex. P1) was presented to him, then at the alteration of the date on it for a period of three years or at the time when the second cheque (Ex. P2) was negotiated. Again, this was not a case where the plaintiff was labouring under suspicion that there was something wrong and he was afraid to make inquiries because he would come to know the true nature of the transaction. This was not a moneylending transaction since no evidence was adduced to show that interest had been claimed and agreed upon. Again, the cheques were not obtained by P.W. 2 by fraud, duress, force or fear or for an illegal consideration nor were they negotiated in breach of faith which would make the title of the negotiator defective under the provision of section 29(2).

In the circumstances, I am of the view that the plaintiff was a holder in due course. Although it could be said that he had taken them for value depending upon P.W. 2's repayment to the defendant to meet the cheques, the principle as expounded in *Jones* v. *Gordon* by Lord Blackburn must apply: —

"Negligence, in the maker of an instrument payable to bearer, makes no difference in his liability to an honest holder for value.....".

The defendant was more than negligent He knew he had no money and yet took the risk of issuing cheques payable on demand. The learned magistrate found as a fact that the defendant admitted responsibility for the cheques. I think the defendant is caught by section 55(1) of the Ordinance which states: —

"55.(1) The drawer of a bill by drawing it —

(a) engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured, he will compensate the holder or any indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken;

(b) is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse."

Two points were raised by Mr. Maniam for the respondent, namely: —

(1) the absence of notice of dishonour on Ex. P2 which was returned by the bank when it was presented by the plaintiff for payment;

(2) failure by the plaintiff to present Ex P1 to the bank for payment.

As regards (1), section 48 of the Ordinance requires notice of dishonour to be given and section 49 provides the rules applicable to notice of dishonour in order to be valid and effectual. However, the drawer of a cheque is not entitled to notice of dishonour if such notice is waived either express or implied. In this respect, I would like to quote the judgment of Yong J. in *Mohamed Amirdin* v. *Varatharajan*,[4] as regards the meaning and extent of the word 'waiver' and which I accept with respect: —

"The appellant, by not having sufficient effects in his banker's hands and having made no arrangement with them for an overdraft to meet the amount drawn on the cheque, had dispensed with notice by waiver."

Taking into consideration the facts and circumstances in this case, the principle applies. Such notice was waived by implication, and the respondent's argument on this matter must fail. If at all Ex. P4A is considered as notice, it was sent well out of time as required under section 49(1).

With regard to (2), the second cheque was not presented for payment in the bank by the plaintiff on the ground as stated in the pleadings, that it was not done at the request of the defendant. In his evidence the plaintiff in cross-examination stated that his brother P.W. 2 requested him to withhold it. The learned magistrate did not appear to take this into consideration at all in his grounds.

As regards the law relating to presentment, section 45(1) of the Ordinance requires a bill to be duly presented for payment and in the case where a bill is

payable on demand then presentment must be made within a reasonable time, subject to section 46. If it is not presented, the drawer shall be discharged. Subsection (2) provides that presentment for payment is dispensed with (a) where after the exercise of reasonable diligence presentment cannot be effected. The fact that the holder has reason to believe that the bill will, on presentment, be dishonoured, does not dispense with the necessity of presentment.

Counsel for the plaintiff relied on the English Bill of Exchange Act, 1882, wherein sections 45, 52(1) and 87(1) are relevant. These sections are in *pari materia* with the relevant sections in our Ordinance and similarly numbered. In this regard, *Halsbury's* Law of England, 3rd edition, Volume 3, page 198, at paragraph 338, says as follows: —

"A cheque is a bill drawn on a banker payable on demand, and should be presented for payment within a reasonable time of its issue. But failure so to present it does not discharge the drawer, as a right of action subsists against him, and is only barred by the operation of the Limitation Act, 1939."

The effect of non-presentment is discussed in the same paragraph thus: —

"Where, however, a cheque is not presented within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment as between him and the banker to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such cheque been paid."

I am of the opinion that it is lawful for the plaintiff to obtain judgment for the amount of the two cheques, *i.e.* for $801.30. The appeal is therefore allowed and judgment is given for the plaintiff with costs.

Appeal allowed.

Solicitors: *Atma Singh Gill & Co.; P. S. Mariam & Co.*

LOW KWYE YING v. CHAN YEK YING

[O.C.J. (Sharma J.) October 16, 1970]

[Malacca — Civil Suit No. 117 of 1970]

Landlord and Tenant — Covenant for quiet enjoyment — Statutory tenant — Breach of covenant by landlord — Application for injunction and declaration — Temporary injunction.

In this case the plaintiff sought an injunction and declaration against the defendant. It appeared that the plaintiff was a tenant of the ground floor of the premises of which the defendant was the landlord and owner. The plaintiff had throughout the period of her tenancy the use of water, the kitchen, the bathroom and the toilet on the ground floor. The defendant however took steps to cut off the water supply to the plaintiff by locking the water tap and she altered the premises to cut off the rear portion of the ground floor from the portion in the occupation of the plaintiff, with the result that the plaintiff and her family were deprived of the use of the bathroom, the kitchen and the toilet.

Held: there had been a breach by the defendant of the covenant for quiet enjoyment and in the circumstances a temporary injunction would be issued against her to restore the *status quo ante* until the suit was finally disposed of.

Cases referred to:-

(1) *Lavender* v. *Betts*, (1942) 167 L.T. 70.

(2) *Manchester etc. Railway Co.* v. *Anderson*, [1898] 2 Ch. 394.

(3) *Booth* v. *Thomas*, [1926] 1 Ch. 397.

(4) *Morris* v. *Edgington*, (1810) 3 Taunt. 24; 128 E.R. 10.

(5) *Sanderson* v. *Mayor of Berwick-Upon-Tweed*, (1884) 13 Q.B.D. 547 at p. 552.

(6) *London & Blackwall Railway Co.* v. *Cross*, (1886) 31 Ch. D. 354 at p. 369.

(7) *Krehl* v. *Burrell*, (1877) 7 Ch. D. 551.

(8) *McManus* v. *Cooke*, (1887) 35 Ch. D. 681.

(9) *Shaw* v. *Stenton*, (1858) 2 H & N 858; 157 E.R. 353.

(10) *Allport* v. *Securities Corporation*, (1895) 64 L.J. Ch. 491.

(11) *Brauns* v. *Glesize*, 130 Ind. 167.

CIVIL SUIT.

S. C. Navarednam for the plaintiff.

Miss Tan Chee Lan for the defendant.

Sharma J.: The principal claim of the plaintiff in this suit is for an injunction and a declaration. The facts are not very much in dispute. The plaintiff is the tenant of the ground floor of premises No. 139 Jalan Bunga Raya of which the defendant is the landlord and the owner. The defendant occupies the first floor of the same premises. The plaintiff, throughout the period of her tenancy, has had the use of water, the kitchen, the bathroom and the toilet on the ground floor. On or about the 7th day of March 1970 the defendant cut off the water supply to the plaintiff by locking up the water tap. The result of this was obvious. The plaintiff from that moment onwards was forced to get her supplies of water from elsewhere and it was fortunate for her that she was able to do so from the house next door, *i.e.* premises No. 137 Jalan Bunga Raya. On the 4th day of April 1970 the defendant demolished the bathroom and on the 31st day of May 1970 constructed a door on the ground floor whereby she cut off the rear portion of the ground floor from the portion in the physical occupation of the plaintiff. The defendant locked this door which meant that the plaintiff and all the members of her family were deprived of the use of the bathroom, the kitchen and the toilet. These basic facts are not denied by the defendant. Various affidavits have been filed in support and in opposition to the motion. The defendant has tried to explain in those affidavits the reasons for her conduct and she has alleged that there were various acts of annoyance on the part of the plaintiff or her children which alone induced her to do what she had ultimately done. I may pause here and say that all those acts of annoyance or even threats to the safety and life of the defendant are not really very material for the purposes of determination of the real question involved in this application. The defendant should have sought proper redress in respect of those acts attributed to the plaintiff and which she now complains of and which she says can excuse her own conduct. If a wrong had been done by the plaintiff it did not thereby follow that another wrong done by the defendant was justifiable on that ground.